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LEGAL WRITING AS GOOD LITERATURE†

THE HONORABLE EDWARD D. RE*

INTRODUCTION

The art of legal composition has been defined as "the art of composing or writing all documents which are either expressly intended to be, or which frequently become the subject of legal interpretation."¹ From the written expression of the law in judicial opinions and statutes to simple agreements that define the rights and obligations of individuals, legal writing encompasses a broad spectrum of styles, forms, and documents. Briefs, pleadings, opinion letters, law review articles, treatises, basic contracts, and complex trust instruments all fall within the wide ambit of legal writing. In light of the fundamental importance of these writings, it is interesting to note that, until recently, relatively little attention was paid to the quality of legal writing. During the past few years, however, lawyers have endured a torrent of criticism, often phrased in derisive, if not acerbic, terms, for a stilted and prolix literary style. The results have been constructive and encouraging. Law schools and professional organizations have responded with programs and courses designed to improve the basic writing skills of lawyers. Throughout the profession, there seems to be a heightened appreciation of the importance of writing well. This Article

† Copyright 1984 by Chief Judge Edward D. Re. This Article is based upon remarks delivered at a meeting of SCRIBES at the Annual Meeting of the ABA, Sunday, August 5, 1984, at Chicago, Illinois.

* Chief Judge, United States Court of International Trade. B.S., LL.B., J.S.D., D.Ped., LL.D., D.H.L. Distinguished Professor of Law, St. John's University School of Law.

reflects the conviction that legal writing can transcend the boundaries of minimum proficiency, and attain, as the great legal writers of the past have demonstrated, the enduring values of good literature.

Writing requires the use of words, and words have the power to convey thoughts, arouse emotions, and motivate action. They are the symbols of ideas and knowledge which represent our human experience. By the use of words we reveal our minds and hearts. Often our intelligence and degree of culture and learning are revealed and measured by our use of words and language.

To speak of words, expression, and the development of language is to examine the most remarkable invention and accomplishment of civilization. Epistemology and the philosophy of language have intrigued the great thinkers from Parmenides, Plato, and Aristotle to Wittgenstein\(^2\) and Foucault.\(^3\) Indeed, the study of language is at the core of philosophical inquiry into the nature and transmission of knowledge. The subject embraces the most subtle implement or weapon of the lawyer, and the memorial of the judge.

The English language possesses extraordinary richness, vitality, and fluidity. This richness stems from the wholesale borrowings that resulted in the incorporation and fusion of many different languages. Indeed, every change, fusion, or modification of a language reflects the changes in the population brought about by invasion, immigration, or the evolving social relationships among the various peoples.

As a frame of reference, it may be well to remember that Julius Caesar landed in Britain in 53 B.C. In 43 A.D. the Roman conquest of Britain was begun by Agricola, and, for the next three and one-half centuries, Britain was a Roman province. The Roman legions were not evacuated until 410 A.D. It is, therefore, an interesting historical fact that Latin was spoken in Britain long before the development of either old or modern English.\(^4\)

The Celts are generally regarded to be the original inhabitants of Britain. The invasion by the Jutes in 449 was followed by a se-

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\(^3\) See, e.g., M. Foucault, Les Mots et Les Choses (1966); M. Foucault, The Order of Things (1970) (The Order of Things is Foucault's own translation of his Les Mots et Les Choses) [hereinafter cited as ORDER OF THINGS]

ries of migrations, notably that of the Angles and Saxons. The name Englisc or Anglish was applied to a West-German dialect spoken by the Angles and Saxons who migrated from the coast of Germany, and settled in Britain in the 5th and 6th centuries. It is from this period that we speak of Anglo-Saxon as the early language of the island. *Beowulf* was written in the 7th or 8th century, probably by a Christian monk. Another group of invaders, the Danes, who came to Britain in 787, fused not only their people, but also their language.

As a source of vocabulary enrichment, the greatest contribution was made by the Roman missionaries who came to the island in 596 A.D. St. Augustine arrived in Canterbury with forty Benedictine monks, and built a monastery where he established his episcopal seat. These Roman missionaries, who were welcomed by Ethelbert of Kent, made an enormous Latin contribution to Britain and to the English language. Latin borrowings became even more numerous in the late 15th and 16th centuries as a result of the revival of the interest in classical learning. English scholars of the Renaissance continued to add Latin words to the English language. English also derived countless benefits from Latin’s descendant, Italian, the language of the arts.

Next to Latin, the French language has made the greatest contribution to English, commencing with the borrowings that resulted from the Norman conquest of Britain in 1066. It is, of course, well known to lawyers that William the Conqueror imposed French as the official language of the law and government, and that its influence continues to be felt today. In addition, the English language also expanded by wholesale borrowings from Greek.

From this very abbreviated synopsis of the early development of the language of the law, it is easy to see the essential importance of a lawyer’s knowledge of words and of etymology. Indeed, knowledge of the origins, development, and attendant nuances of words cannot but add to their power in a lawyer’s hand, for, in the simple, yet penetrating language of Professor Chafee: “[w]ords are the principal tools of lawyers and judges, whether we like it or not.”

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6 See id. at 458-60; Sherman, *The Romanization of English Law*, 23 *Yale L.J.* 318, 319 (1914).
7 See D. Mellinkoff, *The Language of the Law* 118-25 (1963); Re, *supra* note 4, at 462-64.
7 Chafee, *The Disorderly Conduct of Words*, 41 *Columbia L. Rev.* 381, 382 (1941), reprinted in *Re, Freedom’s Prophet: Selected Writings of Zechariah Chafee, Jr.* 35 (1981);
Thus, it is clear that "the effective use of words and language is an indispensable skill for success, not only in law school, but, more importantly, in the practice of law." No one can doubt the deeply held conviction that, in preparing for the study of law, the student must prepare for a "profession that places such a special premium on words and language—the very basis of all advocacy and the law itself." Words are the currency of thought for they are the means for the transmission of thoughts and ideas. Their function is to convey knowledge, ideas, and thoughts that are understandable to the listener or reader. A rich vocabulary and the ability to choose the right word are the ingredients of literary excellence. The greater the knowledge of the shades of meaning of words, the greater the author's ability to express thoughts with precision and subtlety.

In the past, I have highlighted not only the importance of words and language, but also the various considerations that precede the process of communication or writing. Effective legal writing "requires more than the ability to write well." What is required pertains to the indispensable qualities of the lawyer, such as the ability to grasp, analyze, and synthesize facts. I have emphasized that the demands of the legal writing process include processes, such as thinking, learning, and planning the literary

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9 Id.; see Macmillan, Law and Language, in VOICES IN COURT 106, 106-08 (W. Davenport ed. 1958). As Lord Macmillan noted:
To the legal profession, above all others, words and their meanings are a matter of supreme concern. The lawyer, indeed, may not unfairly be described as a trafficker in words. They are his staple, his stock-in-trade. . . . For all day and every day the lawyer is using words, whether he is framing a conveyance or a contract, advising a client about his affairs, arguing a case, writing a judgment or opinion, preparing the report of a decision—judges, counsel and solicitors are constantly making use of words, written or spoken, and are constantly endeavoring by the use of words to convey their meaning to others.
Macmillan, supra, at 106.
10 Cf. Towne v. Eisner, 245 U.S. 418, 425 (1918). Justice Holmes reminded us that "a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Id.; see also B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 50-51 (1945). Bertrand Russell, in a brief chapter on Parmenides, wrote: "although the dictionary gives what may be called the official and socially sanctioned meaning of a word, no two people who use the same word have just the same thought in their minds." B. RUSSELL, supra, at 50-51.
composition, that precede the effort to commit thought to writing. The communication or writing is the last effort of the legal writing process.

The importance of clarity of thought and planning cannot be overemphasized. Indeed, in L’Art Poétique, a didactic treatise in verse written in 1674, Boileau, the celebrated French literary critic, gracefully described the relationship of lucid thought to lucid writing. His words, “[c]e que l’on conceit bien s’enonce clairement? Et les mots pour le dire arrivent aisément,”¹² may be freely translated: “That which one conceives well, is clearly expressed, and the words to express it come easily to mind.”

Literary Composition

Some lexicographers define literature as “all writings in prose or verse . . . without regard to their excellence.”¹³ I prefer the more restrictive definition, which refers to “writings having excellence of form or expression and expressing ideas of permanent or universal interest.”¹⁴ My theme, therefore, expresses the firm conviction that, because of literary excellence and enduring value, legal writing can fall within this second definition and can indeed be good literature.

What is literature may be said to be an elusive question only in the sense that it is also an elusive question to ask what constitutes a poem. Matters of taste or judgment, and values as to quality and beauty must be respected. Nevertheless, it must seem obvious that there is a basic difference between prose and poetry.

A literary composition is no less a form of literary expression and art merely because it does not attain the excellence and beauty that would have been possible had it been created by more gifted hands. Shortcomings or defects in quality of the product or composition do not affect its essence, type, or genre. That legal writing, therefore, is a literary form should hardly cause surprise. What is significant is that, beyond belonging to a genre of literary composition, legal writing can be good literature, possessing all the qualities that distinguish good literature, music, and art.

Because of the demands of the legal writing process, legal composition may be more difficult to write than other forms of lit-

erary composition. In legal writing the author is constrained to record what the facts accurately reveal, and must conform to the restraints of style and form mandated by rules of court. Nevertheless, the dictates of legal style and structure are no excuse for poor writing. All literature must conform to some style and structure. A poet writing a sonnet, for example, must confine his thoughts to fourteen lines, as well as to certain well established conventions of prosody and rhyme. Yet, it is within this structure that words are transformed into art. A legal writer is also confined to an established structure. It is the precision and elegance that the author is able to bring to bear within this structure that distinguish the good legal writer from the mediocre one.

Charles-Augustin Sainte-Beuve, the Boileau of the 19th century, maintained that to comprehend an author's work, one must understand or know the author. In his words, what is necessary is "la connaissance de l'homme même," that is, a knowledge of the man himself. Hippolyte Taine, the 19th century French literary critic, went further, and suggested that the author is also the product of "circumstances." He described the three "forces" that contribute to the basic moral condition of the author or artist as "la race, le milieu, le moment." By race, Taine referred to the natural or hereditary qualities that are innate in a human being, which include not only the common characteristics of a people, but also the vast spectrum of human attributes and qualities of the particular person. By milieu, he meant the social environment or society, and by moment, the period in time or history. Clearly, these three forces also determine the tenor of legal literature.

The word "literature" stems from the words letters and learning; it includes those elements of quality and excellence that endure the passing of time. We know that literature includes poetry, prose, drama, narratives, essays, and a variety of other works that embrace short stories, biographies, novels, and treatises. Literature records the truth and wisdom of the human condition and national

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17 I am reminded of Robert Frost's famous epigram: "Writing poetry without form is like playing tennis without a net."
18 See Sainte-Beuve, La méthode de Sainte-Beuve, in 2 NINETEENTH CENTURY FRENCH READINGS 16, 17 (A. Schinz ed. 1939).
20 Id. at 41-42.
21 See id. at 42.
experience. The study of literature is of inestimable value because it reveals and reflects the character and contributions of peoples and nations, and records the broad sweep of history and civilization. With an appreciation of the true meaning of literature, and its function in the world of education, scholarship, and learning, one can readily see its close relationship to the law.

The law of a nation and its people reflects the society and social order of that nation, and the moral element of its people. It is a portrait or mirror of the people, and the society to which it pertains. Indeed, it has been said that the law is the embodiment of the moral sentiment of the people. Its humanizing role, in preserving peace and order and attaining justice, should inspire the noblest sentiments to illumine our path and mission.

An apt illustration of legal literature as an embodiment of ideals is found in Justice Holmes' dissent in *United States v. Schwimmer*, in which a Quaker had been denied citizenship because she refused to swear to "bear arms" to defend the Constitution. Justice Holmes wrote: "I would suggest that Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."

**THE LITERATURE OF THE LAW**

For lawyers, law teachers, and judges, concerned with the law and its preservation in writing, it is particularly significant that the literature of the law records the precepts, values, and commitments of people, nations, and civilizations.

I have always thought that lawyers should be masters of words and language, and that judges should be philologists of the first order. Students of legal history can recount with ease some of the

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reasons for the stilted, prolix, and redundant language of English law.\textsuperscript{24} Surely its multilingual origins are well known. None of the reasons that resulted in "legalisms" and "lawyerisms" need be recounted here.

One detractor, however, has asserted that lawyers consciously write poorly as a means of furthering their own economic interests.\textsuperscript{25} We are told that through obfuscation and confusing terminology lawyers are somehow able to delude the public into believing that lawyers are wiser, and, therefore, more valuable economically.\textsuperscript{26} Furthermore, the accusation is made that lawyers view language as "an instrument of deception" and a "barrier" to truth.\textsuperscript{27} According to this cynical view, legal writing is designed to dehumanize the participants in the legal process. Faced with this prospect, the commentator concludes that lawyers are thrown into some kind of existential angst and "begin to despise their language, and their distaste reflects itself in poorly written prose."\textsuperscript{28}

This point of view is as absurd as it is pernicious. First, it assumes that the members of the legal profession are of a uniformly low and devious character. This merely illustrates the ease with which a futile cynicism can be substituted for thought. Second, it misconceives the nature and province of law in society, as well as legal writing. The essence of legal writing is to apply the abstract rules of law to the particular facts or events at issue. In any legal writing, the author examines the relationship of a series of events or behavior to the precepts or legal norms that have been established by society. The approach taken depends upon the writer's role in the administration of justice. For example, in a brief, in an effort to persuade, the lawyer argues and urges the cause of a client. The role of an advocate is to communicate the client's view of the facts as effectively and as convincingly as possible, within the bounds of the law and professional ethics.\textsuperscript{29} In a judicial opinion,

\textsuperscript{24} See D. Mellinkoff, supra note 6, at 399-400.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 1392.
\textsuperscript{28} Id.
\textsuperscript{29} See, e.g., Model Rules of Professional Conduct Rule 3.3(a) & comment (1983). See also Model Code of Professional Responsibility Canon 7 (1979) (zealous representation); id. EC 7-23 (inform court of legal authority); id. DR 7-102 (delineating bounds of client representation). The comment to Model Rule 3.3, "Candor Toward the Tribunal" provides: "the advocate's task is to present the client's case with persuasive force." Both the new Model Rules and the old Model Code prohibit a lawyer from knowingly making a false
the judge endeavors to explain, as clearly and as concisely as possible, the reasons for the judicial decision. In each case, the objective is communication. Indeed, effective trial lawyers are successful because of their talent for communication, not obfuscation. And does anyone seriously imagine that the modern business executives who pay the fees of corporate lawyers today are left befuddled and awestruck by a “whereas” or a “hereinafter?”

The late Michel Foucault, the French philosopher, observed that language functions “to tame the wild profusion of existing things.” That is, language brings order to the constant stream of conflicting perceptions and images that our senses send to our brain every second. Through the medium of language, we are able to conceptualize, to classify, and to order these sensory perceptions into familiar patterns that can be understood and acted upon. Since other humans do the same, we are able to communicate, to act in concert with others. Thus, language is the foundation and essence of human civilization. As Foucault and others have pointed out, language is the perspective that defines the perimeters or limits of our thought.

So it is with the language of law. As a society, we rely on law to bring order to the too often random vicissitudes of human events. From the ordinary transactions of daily life to the most disturbing extremes of the human condition, law, through the medium of language, defines and brings order to what would otherwise be chaos and confusion. And, as Foucault said in another

statement of law or fact, see Model Rule 3.3(a)(1); MODEL CODE DR 7-102 (A)(6), and from failing to disclose directly adverse legal authority in the controlling jurisdiction, see Model Rule 3.3(a) (3); MODEL CODE EC 7-23. See generally Re, The Partnership of Bench & Bar, 16 CATH. LAW. 194, 200-04 (1970) (discussing lawyer’s role in ethical justice); Jefford’s Lecture, supra note 21, at 9-11 (essential for professors to teach ethics).


ORDER OF THINGS, supra note 3, at xv; M. FOUCAULT, supra note 3, at 7 (“le foisonnement des lettres”).


What, after all, is the law? At its best, at least as laymen see it, isn’t it an attempt to methodize the madness of mankind? Isn’t it a high-minded endeavor to create group sanity out of individual surrenders to folly, and to regulate personal impulse so that it becomes personal order? Doesn’t it seek to superimpose a pattern of reason on a world of passion, and to offer a guarantee of continuity by
context, there is "nothing that demands a sharper eye or a surer, better-articulated language . . . than the process of establishing an order among things . . . ."33 Those who debase the language of the law, whether through the lack of care or the lack of ethics, debase their profession and society as well.

For many years I have been concerned with improving the quality of legal writing. Because of the firmly held belief that the principles of legal writing can be taught and can be learned, I undertook the writing of a text on Brief Writing and Oral Argument.34 My experiences over the years have confirmed my conviction that legal writing or legal composition can be taught, can be learned, and can, indeed, be good literature.

For lawyers, law teachers, and judges, it is well to remember that, in simple terms, a written or literary composition is speech that has been committed to writing. It is important to note that the act of writing gives speech a new form. Writing is the ability to create a literary composition that is permanent and enduring. Clearly, therefore, notwithstanding the power of eloquent speech,35 committing speech to writing raises the level of importance of the communication, for speech will now be memorialized for future generations. The usefulness, value, and immortality of the literary composition will depend upon its excellence in substance and content, and its grace, elegance, and beauty of expression. Since the causes that made the language of the law and legal writing stilted, prolix, and redundant have expired, there is no reason why all legal writing today cannot be embodied with the same literary excellence as all good literature.

Justice Benjamin N. Cardozo, known for the literary excellence of his writings, began a lecture entitled Law and Literature with the words: "I am told at times by friends that a judicial opinion has no business to be literature. The idol must be ugly or he may be taken for a common man."36 I emphatically deny that the

relating the precedent of the past with the dilemmas of the present?

Id.

33 ORDER OF THINGS, supra note 3, at xix; M. Foucault, supra note 3, at 11.
34 E. RE, supra note 15.
35 T. Madia, STORIA DELL 'ELOQUENZA 21 (History of Eloquence) (dall 'Oglio ed. 1959). "La parola 'scritta' ha minore potenza della parola 'detta'." Id. (The written word has less power that the spoken word) (author's translation); see also Emerson, Essay on Eloquence, in 1 COMPLETE WRITINGS OF RALPH WALDO EMERSON 640 (1929).
idol must be ugly. This fallacy misconstrues the nature both of the judicial opinion and of literature. A striking refutation can be found in the opinions of Chief Justice John Marshall. His seminal opinions are well known and need not be quoted at length here. One short passage from *Marbury v. Madison* may suffice:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Who, then, can doubt that the literary excellence of his opinions—their impeccable reasoning, their majesty and eloquence—lent untold weight to the then untested authority of the Supreme Court. Clearly, a judicial opinion, as any other form of legal writing, may be literature. Indeed, a judicial opinion, as a form of legal writing, may possess extraordinary literary excellence. Examples include Justice Cardozo’s lecture, from which I have quoted, as well as all of the legal writings and judicial opinions that he quoted in that splendid lecture.

Of course, no discussion of literature and judicial opinions would be complete without a mention of Justice Oliver Wendell

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37 David Loth began his biography of Chief Justice Marshall as follows:
There is more truth in law than in lawyers, more poetry in justice than in judges. But once in a while a man mounts the bench with the salt of life, the spice of wisdom, and the sweetness of humor blended into him so subtly yet so successfully that those who are quite unlearned in the law glimpse some of its beauties. Of all the judges who ever lived, Marshall contributed the most to the way in which his country is governed—and the way in which it governs itself.

D. LOTH, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 11 (1949). While serving as Chief Justice, Marshall also authored a five volume biography of George Washington. Interestingly enough, the literary quality of this work was widely regarded as inferior to that of his judicial opinions. See id. at 239-42.

38 5 U.S. (1 Cranch) 137 (1803).

39 Id. at 177. Although this quotation is familiar to American lawyers, it may remind students of legal history of Lord Coke’s “famous dicta” in *Doctor Bonham’s Case*, officially reported as, *The Case of the College of Physicians*, 8 Co. 114a, 77 Eng. Rep. 646 (C.P. 1610):

> “[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.” Id. at 118a, 77 Eng. Rep. at 652. For an interesting discussion of this landmark case, see Smith, *Dr. Bonham’s Case and the Modern Significance of Lord Coke’s Influence*, 41 WASH. L. REV. 297 (1966).

Holmes. Justice Holmes was a writer with great range who was able almost invariably to choose the exact words and tone that the issue demanded, from the definition of a seemingly simple phrase to the resolution of the most vital issues. Compare, if you will, "[t]o maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun,"41 with

Delusive exactness is a source of fallacy throughout the law. By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification . . . .42

Although it is possible to read from Holmes for hours, I will limit myself to one more brief passage which illustrates the uncommon felicity of expression Justice Holmes was able to achieve without sacrificing accuracy, brevity, or clarity:

[A] Constitution is not intend[ed] to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.43

Justice Holmes stated his premise with clarity, explained his reasoning with brevity, and concluded with characteristic precision. As Justice Frankfurter, another jurist who strove for literary excellence, eulogized, Justice Holmes "has written himself into the slender volume of the literature of all time."44

44 Frankfurter, Mr. Justice Holmes and the Constitution, in Mr. Justice Holmes 46, 118 (F. Frankfurter ed. 1931). For an intriguing discussion of the relationship between literature and Holmes' legal philosophy, see Hopkins, The Development of Realism in Law and Literature During the Period 1883-1933: The Cultural Resemblance, 4 Pace L. Rev. 29, 33-41 (1983).
LEGAL WRITING AS LITERARY COMPOSITION

Legal writing must be understood and appreciated as a genre of literature that uses and blends the various elements of literary composition such as exposition, argument, definition, narration, description, comparison, contrast, examples, and analysis. Like all forms of literary composition, legal writing should possess unity, coherence, and emphasis. As I have noted, however, because of the demands of the legal writing process, legal composition may be more confining and restrictive. In all legal writing the author must state what must be said with maximum brevity. This, of course, means that greater discipline and thought must precede the writing process. As a consequence, it may also mean that, occasionally, the legal composition may be less dramatic or eloquent, to the detriment of its interest or literary quality.

Justice Cardozo stated that in matters of literary style, the "sovereign virtue for the judge is clearness." The element of clarity is indispensable in all forms of legal writing. The point that needs to be made, however, is that, although the subject matter of the literary composition may be the application of legal rules or principles to particular facts, the embodiment of the law in legal composition should not necessarily render the composition less literary. Assuming that legal writing must possess the qualities of accuracy, brevity, and clarity, these attributes of themselves do not detract from the literary merit of the legal composition. Indeed, they facilitate reading and understanding.

It must be admitted that legal writing, unlike creative writing, is not boundless and without restraining limits. As Justice Frankfurter noted, "Law as literature is restricted by its responsibility." Legal writing does not permit the author the freedom to follow flights of fancy or the liberty to venture into imaginative adventures and delights. Facts cannot be changed to heighten the interest in the drama, and legal principles cannot be misstated to achieve a desired result. Lawyers cannot indulge in novelty for its own sake. Ezra Pound laid down the creed of modernist literature when he declared, "Make it new." The legal writer can afford this luxury only when innovation will add to the clarity or effectiveness of the document. Imagination, of course, is indispensable, but the opinion must be grounded in precedent; the well defined and oft-

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46 Cardozo, supra note 36, at 341.
repeated terms of art must be used; and the argument must flow from established principles. Nevertheless, lawyers skilled in the art of legal writing are uniquely qualified to add to the literature of the law.

Legal writing, as a literary composition, must reflect the qualities of all good literature. Surely, the most basic requirement is the knowledge of good English. The next requirement is good diction, which is characterized by precision of expression, and appropriateness to the subject matter, purpose, and audience. Diction establishes tone as well as the level of usage of the literary composition. The levels of usage are usually described as literary, colloquial, slang, or illiterate. Unity and coherence relate to the relationship of sentences to one another, and the logical development and sequence with which thoughts are expressed. Style refers to the manner of expression; that is, the simplicity and sincerity that mirror the mind and thought of the author.

Good English, diction, unity, coherence, emphasis, and style are the elements of all literary composition and literary English. I hasten to add that literary style is not to be confused with style that is ponderous, pompous, and overburdened with irrelevant flourishes. Qualities of simplicity and eloquence are not to be confused with pedantry or pomposity. Writers and readers alike know that inspiring messages, and words of wisdom that are memorable and eternal, are often phrased in the simplest language. Simplicity of expression is a quality that may characterize fluent, powerful, and eloquent language. Consider, for example, Chief Justice Warren's concise holding in Brown v. Board of Education:47 "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."48 The language and syntax are simple; one need not have attended law school to comprehend their crystal-clear import. Yet this language stands as a powerful and eloquent memorial to our quest for a more just society.

We need not limit ourselves to the famous cases or to the publicized landmarks. A memorandum, brief, or judicial opinion in what may seem an ordinary case, phrased in language that expresses an honest and genuine passion for social order and justice, may be remembered, at least by those affected, long after the pop-

48 Id.
ular play or novel has run its course. Indeed, a novelist might envy the impact an attorney or judge may have with the written word. Since legal writing embodies some aspect of the law, reflecting in turn the morals and values of the social order, its subject matter possesses a majesty not always found in ordinary literary composition.

An excellent example of the blending of the public ideal of the law with the reality of its effect on an individual is found in the following passage by Arthur T. Vanderbilt, a distinguished lawyer and law school dean, who served as Chief Justice of the Supreme Court of New Jersey:

The attorney whose professional thoughts begin and end with his own private clients is a pitiable mockery of what a great lawyer really is. Training for public service is a lifelong career. There is no sadder sight in the legal profession than that of a lawyer who has long dreamed of unselfish public service but who has been so engrossed in serving private clients that when the call does come to him for a public career he has so lost contact with the spirit and problems of the day that his efforts in the public interest prove abortive. What should have been a crown of laurel frequently turns out to be one of thorns.49

Legal literature, then, commencing with the majesty of the law, and reflecting its impact on all aspects of life itself may indeed be literature of exceptional literary merit and enduring value.

Justice Cardozo reminded us that the ancient sages of the law are remembered not merely for the wisdom of what they wrote, but also for the beauty of their expression. Of course, we may add that what Justice Cardozo wrote of the ancient sages of the law may also be said of Justice Cardozo. I will not quote additional literary gems of the scholarly giants of the law to prove my point that legal writing can indeed be good literature. Some of the writings are well known, and offer irrefutable proof, sufficient even for the most incorrigible cynic or universal skeptic, that legal writing can be good literature.

I should like to give two examples of legal writing from law books that record in eloquent and enduring language the broad sweep of legal history. My first quotation starts with the first sen-

tence from Pollock & Maitland’s *The History of English Law*. Sir Frederick Pollock and Professor Frederick William Maitland informed the reader of the difficulty in finding a suitable point of beginning for their vast undertaking with the following words:

Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web. The oldest utterance of English law that has come down to us has Greek words in it: words such as bishop, priest and deacon. If we would search out the origins of Roman law, we must study Babylon: this at least was the opinion of the great Romanist of our own day. A statute of limitations must be set; but it must be arbitrary.

Professor Theodore F.T. Plucknett, in the first paragraph of his splendid one volume work, modestly entitled *A Concise History of the Common Law,* echoes the same theme in the following language:

The age which saw the first beginnings of English history witnessed also the decline of Roman law which had run a course of a thousand years, making priceless contributions to civilisation. But behind the Roman system were others still more ancient—Greek, Semitic, Assyrian, Egyptian—all with long histories of absorbing interest.

**Conclusion**

With great difficulty I will forego the temptation to quote many other favorite passages, all clearly literary masterpieces. I have deliberately chosen these quotations from legal history because it may be regarded as dull subject matter not possessing great interest and dramatic appeal. I have already said that the law deals with life and the people who live it. It reflects nature and everything about us. Since its very subject matter is of vital and overwhelming interest, it cannot help but be of value and

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51 Id.; cf. Weber, History Is What Historians Do, N.Y. Times, July 22, 1984 (Book Review), at 13 (reviewing P. Veyne, Writing History: Essay on Epistemology (1984), and P. Ricoeur, Time and Narrative (1984)). "Everything is raw material for history, but history is what historians have the vision to find, or what they choose to do; so there are only partial histories." Weber, supra, at 13.
53 Id.
importance.

It is for us, all students of the law, to devote time and effort in mastering the subject matter of the law and its many legal documents. Our raw materials are of absorbing interest, and are the crucial elements in the administration of justice.

We must also master the richness of the English language, and the elements of literary composition which permit us to express and record our knowledge and our thoughts. Just as law must be read and learned thoughtfully, it must also be written thoughtfully and with care. With the principles of good English and literary composition to guide the author, legal writing can not only be literature, but also good literature of obvious excellence and enduring value.